Petition

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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1981

MONTREAL TRADING LTD.,
Petitioner,

VS.

AMAX INC., AMAX CHEMICAL CORPORATION, DUVAL CORPORATION, DUVAL SALES CORPORATION, IDEAL BASIC INDUSTRIES, INC. and INTERNATIONAL MINERALS & CHEMICAL CORPORATION,
Respondents.

Petition For Writ Of Certiorari to the United States Court of Appeals for the Tenth Circuit

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QUESTIONS PRESENTED

1. Whether an international cartel formed by American, Canadian and Canadian subsidiaries of American producers of potash, the intended purpose and the achieved effect of which was to curtail production and increase prices of potash in the United States and Canada by artificially creating a shortage in both countries, justifies the exercise of jurisdiction in the courts of the United States; or, whether, as the Court of Appeals held, the "comity concerns" between the United States and Canada "outweigh any effect on United States commerce" making jurisdiction in the Federal Court "unjustified"?

2. Whether a ready, willing and able purchaser of potash, who is denied supply solely because of a shortage, which shortage was artificially created by agreement among the members of the cartel in order to increase the prices of potash, has standing to sue; or whether, as the Court of Appeals held, "*only* those who purchased [the available] potash at the artificially high price would have suffered a sufficiently direct injury to have standing to bring an action" and that "one who never purchased potash . . . was too remote"?

3. Whether the District Court committed prejudicial error and denied the right to a jury trial by instructing the jury that the Trading With The Enemy Act prevented the plaintiff from recovering damages and, compounding the error, by failing to advise the jury that their understanding of the instruction, that "there can be no conspiracy," was wrong?

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Petition For Writ Of Certiorari to the United States Court of Appeals for the Tenth Circuit

Petitioner, Montreal Trading Ltd., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit rendered on October 14, 1981.

OPINION BELOW

The opinion of the Court of Appeals, attached hereto as Appendix A, is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on October 14, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. Nature of the Case

This is a private antitrust suit brought by the petitioner under Section 4 of the Clayton Act (15 U.S.C. § 15) alleging damages caused by reason of the respondents' violations of Section 1 of the Sherman Act (15 U.S.C. §1).

At trial, the respondents contended that the Trading With the Enemy Act (50 U.S.C. §§ 1, et seq.) afforded them a complete defense.

These statutes are attached hereto as Appendix B.

B. The Industry

The industry involved is the production and sale of potash.

Potash is a mineral deposit. Its principal use is as an essential element for the manufacture of fertilizer.

The only concentrations of potash in all of North America are at Carlsbad, New Mexico and the Province of Saskatchewan, Canada.

During the relevant period of time, the deposits in Saskatchewan *alone* covered "the needs of the free world for the next *3,000 years*." (TR. 652). Most of the potash consumed in the United States is by the farmers in the midwest, in particular the corn belt and the wheat belt. (TR. 585).

C. The Parties

1. *Respondents*: The respondents produce and sell potash. They have mines in either Carlsbad or Saskatche-

wan or both. They are Amax Inc. and its wholly-owned subsidiary Amax Chemical Corporation (hereinafter "Amax"); Duval Corporation and its wholly-owned subsidiary Duval Sales Corporation (hereinafter "Duval"); Ideal Basic Industries Inc., which produces and sells potash through its Potash Company of America division (hereinafter "PCA"); and International Minerals & Chemical Corporation (hereinafter "IMC").

2. *Petitioner:* The petitioner, Montreal Trading Ltd. (hereinafter "Montreal") is an experienced Canadian trading corporation which buys and sells commodities in the international market.

D. Course of the Proceedings and Its Disposition in the Court Below

On November 17, 1976, the petitioner filed its complaint. On February 13 through 27, 1978, the respondents filed their answers. None of the respondents, by way of affirmative defense or otherwise, claimed that their violations were justified in whole or in part by reason of the Trading With The Enemy Act.

On July 26, 1979, one working day before the trial, the respondents raised their Trading With The Enemy Act issue.

On July 30, 1979, trial commenced before a jury, the Honorable Edwin Mechem, Judge, presiding. At the completion of the petitioner's case, the respondents moved for a directed verdict claiming that they, *ex post facto*, could not have supplied the petitioner "consistent with the provisions with the Trading with the Enemy Act." (TR. 544). The Court took the motions under submission. At completion of the entire case, and immediately prior to argument, the respondents once again moved for directed verdict on the Trading With The Enemy Act. The Court *denied* the motion. Nonetheless, the District Court, over objection, instructed the jury that the petitioner "was not damaged by the defendants' conduct . . ." by reason of the Trading With the Enemy Act.

Almost immediately, the jury sent a note to the Court stating that their understanding of the instruction was that "there can be no conspiracy." The Court did not respond, but simply resubmitted the instructions. Within 5 minutes (TR. 1136), the jury returned a verdict in favor of the respondents.

On August 6, 1979, the Court entered judgment. On August 16, 1979, petitioner filed its motion for a new trial. On August 27, 1979, the motion was denied.

On September 10, 1979, petitioner filed its Notice of Appeal. The sole issue raised by petitioner was the propriety of the Trading With The Enemy Act issue. On October 14, 1981, the Court of Appeals affirmed the judgment without deciding the Trading With The Enemy Act issue "because we agree with defendants' contention that the district court lacked subject matter jurisdiction in this action."

E. Statement of the Facts

1. *Summary:* In the late 1960's and early 1970's the supply of potash far exceeded the demand. As a result, prices decreased and competition among the producers for sales sharply increased.

The premier of one of the Provinces of Canada, Saskatchewan, together with the producers there, formulated a plan to cut back on production so that prices would increase and "cutthroat competition" would be eliminated.

It was recognized that an essential part of such a program *required* the participation and agreement of the producers in Carlsbad, so that an artificial cutback and price increase in Saskatchewan would not be undermined by increased production or lower prices in the United States.

Through a series of meetings and communications, some of which were memorialized in documents "all copies [of which are to] be destroyed," the American producers agreed to participate in the artificial shortage and increase prices. As a result, prices increased threefold, production was curtailed, a plant closed and a number of employees

in Carlsbad were put out of work. Instead of fighting for customers, the cartel agreement permitted the members "to be somewhat selective and *weed out* . . . customers." (TR. 896). At least one participant, as noted in respondent IMC's memorandum, "was greatly encouraged that a potash shortage has already been *created*," (TR. 307).

The petitioner, an experienced international trader, secured a firm offer from a customer to buy potash. Despite many efforts to secure a supply, and because of the artificial shortage created by the cartel agreement, the petitioner lost his sales. The sole reason given by the cartel members was a lack of supply, although one member first stated he had supply, but then reneged.

2. Material Facts

In the late 1960's, the potash industry was afflicted with excess supply in the North American market and the resulting low potash prices. The Saskatchewan government became involved with the "problem" of oversupply and low prices and explored various solutions.

Almost immediately American potash producers embraced the idea of a Saskatchewan marketing plan and cooperated with the Saskatchewan officials in implementing it. There were industry meetings held as early as July 18, 1968. P.Exh. 6 is an interoffice memorandum of Kalium Chemicals, Ltd., which records this July 18, 1968 meeting:

> The Premier asked the meeting about the possibility of *increasing prices* now. The replies were naturally general and vague but left no doubt *it was desired by all companies.*
>
> Mr. Dudley P. Morris of Duval made the point that the best medicine would be for supply to be closer to demand. (TR 291).

The document also shows defendants IMC and PCA present at the meeting. (TR 293-A).

The desire of American producers for Saskatchewan's action is shown by the following letter: P.Exh. 8-1, dated August 8, 1968, is from the President of IMC to the Chairman of Borax, his competitor:

> My own feeling is that *some of us should get together as quickly as possible to formulate plans and programs for relief* over and beyond the matter of working with the railroads, which seems to be the preoccupation of most of the people currently.
>
> I appreciate your keeping me informed and look forward to more exchanges in the future.
>
> (TR 92).

The Saskatchewan government eventually decided that a program of prorationing was the only solution to the situation in Canada. Prorationing was basically a program restricting the amounts of potash Canadian companies could produce and provided for agreed upon and fixed prices at which the potash would be sold. There were serious misgivings about the program's lawfulness even under Canadian law. (TR 294). Saskatchewan officials nevertheless attempted to rush the program through.

P.Exh. 19 is the first reference to the crucial role of the Carlsbad producers in the Saskatchewan prorationing program. (TR 296-297). While only hinted at in P.Exh. 19, P.Exh. 18 leaves no doubt as to the anticompetitive plan which by then was well under way. P.Exh. 18 is an IMC document dated September 20, 1969, regarding "production and price controls imposed on both Saskatchewan and Carlsbad." (TR 297).

> Any price allocation system must be predicated on *both* producing points subscribing to the same criteria. It should be recognized that any system of production allocation and price control has got to be superimposed on both the Saskatchewan and Carlsbad producing points.
>
> For example, if only Saskatchewan were to be subjected to production and price controls, and if Carlsbad were allowed to operate without restraint, the situation would become impossible for Saskatchewan . . . Canada's total would have to operate at 39 percent of total capacity. This would be economically impos-

sible. Hence, the conclusion that *both producing points must subscribe to the same rules.*"

At about this same time a secret meeting was held in a hotel room in Washington, D.C. In attendance were the competitors IMC, PCA, and Duval. The topic of the Saskatchewan prorationing program was openly discussed. (TR 599, *et seq.*).

Still another meeting of potash producers was held on October 3, 1969 in Saskatchewan at which the topic of the Carlsbad producers' cooperation in the Saskatchewan plan was explored more fully. (TR 300). Defendants IMC, Duval, and PCA attended. An IMC official attending the meeting reported:

> The idea seemed to be that Saskatchewan and New Mexico would institute production controls and a price floor for potash produced and exported from the Province or the State. (TR 302).

Defendants IMC, Duval and PCA were then polled individually, and in the presence of each other, as to whether they were in favor of cooperating. They all voted in favor of cooperation. (TR 302).

What followed next was a meeting in Santa Fe, New Mexico. P.Exh. 29, dated October 10, 1969, was authored by a representative of IMC who participated in the meeting. All copies of the memorandum were ordered "destroyed" by IMC, but one copy escaped destruction. (TR 158).

The memo states the following:

> Premier Thatcher's opening remarks revealed that he is asking three things:
>
> (1) An export license system.
>
> (2) Allocation on production.
>
> (3) Minimum pricing.
>
> He further stated that the purpose of his visit to New Mexico was for two reasons: (1) to receive assurance that New Mexico production would remain as it is, not merely take up the slack created in Canada. Premier Thatcher then called upon Paige Morris, president of Duval Corporation. In general Mr. Morris had the

> same thing to say as Mr. Kerr. He mentioned that the potash executives of all companies were in *agreement* that Canadian production should be reduced and *that Carlsbad production would be held at present levels.* Premier Thatcher then called on me to speak. I said that I had nothing to say at the time with the exception that I was sure I.M.C. would not allocate capital funds for the expansion of muriate production." (TR 158-184).

These accounts of the October 9, 1969 meeting have never been challenged. As a matter of fact they are corroborated by another contemporaneous account. P.Exh. 30. (TR 304-305).

The final meeting in the formation of the conspiracy took place in Saskatchewan shortly after the October 9, 1969 Santa Fe meeting. The principal purpose of this meeting was the delivery of the written assurance from the Carlsbad producers that they would not expand their facilities and increase production.

By the time the participants had arrived in Saskatchewan, the letter of assurance had been prepared. After receiving assurance from PCA, the last to agree, the letter was turned over to Premier Thatcher, and prorationing took effect.

The intended effect of the conspiracy was felt immediately. P.Exh. 62 is a confidential file memorandum dated February 10, 1970, reporting a meeting with Premier Thatcher:

> The Premier also remarked that had he not acted [instituted prorationing], prices would be at $6.00 to $8.00 per ton, net back at mines and, therefore, disastrous, and surely we recognize that $18.75 per ton was much better than prices otherwise would be. (TR 338).

The document continues:

> Mr. Cameron stated that they [Saskatchewan] were on dangerous grounds in some areas and must, therefore, depend on the good will of U.S. producers to carry this

> scheme out. He stated that they talked with the independent producers' group [U.S. producers without Canadian production] and the last one, National Potash Company, had just been in. He stated that although National would not put it into writing, *National had verbally assured the Premier that it would not increase production above last year and would not sell for less than the minimum price.* (TR 340).

The American producers then fulfilled their promises not to expand their facilities and thereby hold production down as agreed upon. P.Exh. 88 is an IMC internal memorandum summarizing a February 20, 1970 meeting of the Potash Conservation Board. Referring to the remarks of one of the participants at the meeting, it states:

> He said he was greatly encouraged that a potash *shortage has already been created.* (TR 307).

The full breadth of the conspiracy can be seen from P.Exh. 59, an IMC interoffice memo dated May 21, 1970 summarizing a potash meeting relating to exports:

> It was agreed that all producers should operate at identical rates of their capacity and should participate in exports at a rate proportional to their capacity to equalize the impact of lower export prices. (TR. 313).

Moreover, it was recognized that exports could only be effectively controlled if one single export agency for all producers was set up (TR. 312); this agency is Campotex.

The defendants' consciousness of guilt is perhaps shown most clearly by P.Exh. 60, dated June 10, 1970, an interoffice memorandum recording the June 1, 1970 potash meeting in Canada attended by defendants IMC, PCA, and Duval:

> As the meeting started, Premier Thatcher announced that he had for release to the press a prepared statement and said that before distributing this to the press, he would like it reviewed by members from the industry to see *if there were any comments which should be deleted for antitrust purposes.*

> Copies of the prepared statement were distributed to the participants and *three items were deleted* at the request of some members. *One item was a reference to the New Mexico producers*; *a second item was a statement that prorationing was instituted with unanimous concurrence of industry*, and the third deletion I did not get. The original statements were picked up by some member of the Premier's staff and revised statements were handed out to the participants later in the day. (TR 319-320).

Defendant Amax's involvement in the conspiracy came to light in the form of a tolling agreement with IMC.

The substance of this Amax-IMC agreement is contained in P.Exh. 84.2, dated September 8, 1970 and reporting the Amax meeting with Thatcher:

> Southwest Potach (Amax) would like the following accomplished in declining order of priority:
>
> I.
>
> (1) Permit Southwest Potash to become associated with Canadian producer, without producer rights.
>
> (2) Be granted initial producer's quota of 400,000 tons of product with growth in accordance with future prorationing allocations.
>
> In return, Southwest Potash, U.S., will reduce its Carlsbad production to 500,000 tons per year of product to remain static during the period of prorationing.
>
> And under roman numeral II (B):
>
> Permit Southwest Potash to purchase from Canadian producers at same discount permitted amongst producers in Canada. (TR 323).

This Amax-Thatcher meeting was also referred to in an IMC document dated December 17, 1970, P.Exh. 83. It makes clear the anticompetitive purpose and effects of the contemplated Amax-IMC combine.

> Thatcher went on to say that he had received important commitments from all the other Carlsbad producers to cut back in Carlsbad. (TR 324).

The IMC-Amax deal illustrates that the conspiracy to withhold production at Carlsbad was in full bloom, and Amax was now clearly considering becoming a participant. By 1971 this was accomplished. This is illustrated by P.Exh. 113, an IMC document dated September 9, 1971 heralding the "benefits" of the IMC-Amax agreement.

The resultant cutback on Amax's production at Carlsbad is unmistakable. P.Exh. 125, dated December 7, 1971, is a document prepared by the President of Amax summarizing recent Carlsbad output:

> On Schedule 1 you will see the original schedule presented to you and Mr. Cameron in your offices, showing *the proposed cutback schedule at Carlsbad* and the expected production schedule in Canada.
>
> Because of the late date of signing of these contracts, *the slowdown of production at Carlsbad* was slightly delayed until mid-May. Nevertheless, we have tried hard to meet the schedule as originally presented by Mr. Arend. On Schedule 1, you will notice that we have written in the actual production versus schedule production, and the actual personnel reduction at Carlsbad. *As you recall, for political reasons, we agreed to reduce our personnel through attrition. This has worked very nicely until recently. Now, however, we find that with economic conditions such as they are in the United States, people are not leaving their jobs as anticipated.* (TR 328).

To the same effect is P.Exh. 159, dated March 13, 1972, a draft of another, similar Amax communication:

> *Amax terminated over one hundred fifty people* at its mine in Carlsbad, New Mexico, and moved approximately 400,000 tons of production to Saskatchewan. (TR 339).

The defendants then were making good on their assurances to the Canadian potash producers and their assurances made to each other up into 1972. But for this conspiracy, the output at Carlsbad would have been greater than the fixed levels of output. This is demonstrated most

clearly in the case of Amax. P.Exh. 180, dated March 13, 1972, is an IMC document which comments on Amax's production capabilities in Carlsbad:

> It has been suggested that Amax cannot produce 900,000 tons after scaling down to what appears to be 500,000 or close to it. Our research without any clues from Amax indicates that they have ten to eleven years of good ore at a 900,000 to one million ton annual rate, and they can extend this with use of newly-evolving techniques to extract slimes.
>
> We think Amax's cost in Carlsbad at capacity operation should approximate $10.50 (excluding royalty costs) per ton. Who in Canada does as well? (TR 343).

The conspiracy continued in full swing into 1973. Plaintiffs' Exhibit 190, dated July 12, 1973 is a Duval communication commenting on the decline in U.S. production

> [T]he Canadian share of the U.S. market is increasing rapidly, not only from the overall growth of the *market, but also from the decline of U.S. production.* (TR 348).
>
> The consequence of these several factors, including Campotex's dynamic activity, is a strong and constant growth of Canadian markets under the shield of the prorationing program. *This Program is working.* It richly deserves continued and total support from all affected parties. (TR 348-349).

To the same effect is P.Exh. 356, an IMC internal memorandum dated July 12, 1973:

> 2. 1973-74 appears to be a booming year for Canadian potash for the following reasons: . . .(b) *There would be less production from other Carlsbad producers.* (TR 349). It is apparent that they constantly need reassurances that the program is acceptable. D.M.R. is doing a good job, ...
>
> In summary, I suggest the following:
>
> (1) That we write a letter expressing our views.
>
> (2) Suggest that other producers do the same.

(3) Make a personal call on Thorson. . . ." (TR 353).

Throughout this period, then, the defendants meticulously abided by their assurances to the Canadian producers to restrict output as agreed upon among themselves. There is evidence of this continuing into 1974. P.Exh. 209, dated May 30, 1974 is an Amax communication relative to production. To the same effect is P.Exh. 244, an Amax document dated August 31, 1973, which summarizes the defendants' cooperation with each other under the prorationing plan:

> With minor exceptions, the producers of Saskatchewan who have operations in the United States have cooperated well. (TR 363).

The evidence shows this to be classic understatement. Potash prices rose steadily throughout the period of the conspiracy. Moreover, the prices charged by the defendants at various times are exactly the same. (P.Exh's. 277.1, 278.1, 280.1, 281.1). Consequently, United States purchasers paid more than other purchasers throughout the world (TR 433).

In an interoffice memo of defendant IMC regarding the "Program" and overseas buyers buying at minimum set prices, the IMC officials expose their scheme of cooperation further by stating:

> He did not believe that East Germany, Russia or the cartel would "misbehave" to a significant degree. He said that Premier Thatcher got as strong a commitment of cooperation from the European producers as he got from Carlsbad. Therefore, he said since the European talks took place only about six weeks ago we should give the Europeans time to react to those talks before we accuse them of non-cooperation.

And, in a confidential memorandum regarding a meeting with Premier Ross Thatcher in Canada, it is stated that:

> Thatcher recapped his worldwide efforts to correct the potash problems. He stated that talks with other producing countries had resulted in promises to him

that . . . the Germans will produce no more than they had last year and will not export more than last year; that although the French would be bringing in the Congo, they would hold the combined output of potash to the tonnage of France last year; that Israel will hold production to that of last year; that Spain operating at 70 percent capacity will hold at the level and will not reopen closed mines as long as everyone else behaves; *that the New Mexico producers had assured him that they would limit production to last year's level and go along with the minimum price*; that Zimmerman, of the German cartel, is going to Russia in an effort to get the Russians to limit production to last year's tonnage.

Thus, if Russia will go along, *the world market could be divided one-third—Canada-U.S., one-third—Europe, and one-third—Russia.* He (Thatcher) also said that with these agreements, all world growth in potash consumption would accrue to Canada. Thatcher also said that he had invited all of these worldwide producers to a remote fishing camp away from the news media to finalize these arrangements. *He said he had invited the U.S. producers, but that Nelson White of I.M.C. had told him that it would be necessary for the Premier to order the attendance of the U.S. producers to avoid legal problems.*

In a letter dated August 1973, defendant Amax admits that "There is plenty of Potash in the world" (TR 362). *This was one and one half months before plaintiff sought potash from the defendants.* Amax continues in the same letter to state that the "almost stopping any imports from other countries is remarkable . . . [T]his development has required the very able handling of world competitors by Campotex." (TR 362, 363).

It is against this background of an artificially created shortage of potash that the plaintiff attempted to buy potash. Plaintiff contacted virtually every potash supplier

in North America and exhausted every possible avenue to acquire potash. (P.Exh. 376.1-376.70). Despite the fact that there was abundant potash available and despite the fact that defendants had excess production capacity, plaintiff was unable to obtain potash. In many cases, no attempt was even made to sell to plaintiff.* Thus, the type of injury the plaintiff suffered—inability to obtain potash—was precisely the type of injury expected to flow from a conspiracy to limit supply.

The plaintiff was unassailed in his testimony that had he obtained the product he would have readily resold it to buyers who were ready, willing and able to buy. The result would not only have been substantial profits for the plaintiff, but a general softening of potash prices as well. Plaintiff testified had he been able to purchase potash he would have been able to offer it at resale for less than prevailing prices. (TR 436, *et seq.*).

REASONS FOR GRANTING THE WRIT

A. The Decision By The Court Below That The Effects Of The Cartel On The Commerce Of The United States Are Outweighed By "Comity Concerns" Constitutes A Serious And Dangerous Threat To The Ability Of Courts Of The United States To Prevent The Establishment And Effects Of Cartels Involving Americans

There are three pertinent antitrust exemptions to the broad reach of the Sherman Act: First, the "Act of State" doctrine, wherein the act of a foreign sovereign is immune from review; second, the "sovereign immunity", wherein a sovereign itself is a defendant; and third, "sovereign compulsion", wherein an individual is compelled by a foreign sovereign to do acts in the foreign nation. Comity is applied along with these three exemptions to determine if jurisdiction shall lie. However, comity is not of itself an anti-

*One supplier offered to assist plaintiff in shipping the potash on their railway cars. They subsequently referred plaintiff to the export association who then said there was no potash available. (TR 527-528).

trust exemption. It should not be invoked simply because foreign elements are present in a conspiracy.

Although the Tenth Circuit speaks in terms of comity, its discussion does not address the Act of State doctrine or the "Sovereign" defenses. Comity cannot be applied *in vacuo* here, but only in the context of the above exemptions. These exemptions are wholly inapplicable to the facts of this case, and thus this case does not give rise to comity concerns.

1. The Act of State Doctrine is Inapplicable to This Case

The act of state doctrine declares that "a United States court will not adjudicate a politically-sensitive dispute which would require the court to judge the legality of the sovereign act of a foreign state." *Intern Ass'n. of Machinists, etc. v. OPEC*, 649 F.2d 1354, 1358 (9th Cir. 1981). The classic enuncation of this doctrine is found in *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897):

> Every sovereign state is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory.

In more recent years, the Court has stated that the act of state doctrine derives from concern over separation of power and is intended to preclude judicial interference with the conduct of foreign affairs by the other two branches of government. As the Court stated in *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 697 (1976):

> The major underpinning of the act of state doctrine is the policy of foreclosing court adjudications involving the legality of acts of foreign states on their own soil that might embarrass the Executive Branch of our Government in the conduct of our foreign relations.

The degree of foreign government entanglement which must be present to invoke the act of state doctrine varies

with the circumstances of each particular case. In *Mannington Mills, Inc. v. Congoleum Corp.*, 505 F.2d 1287, 1293 (3rd Cir. 1979), the court stated, "To determine whether the act of state doctrine applied in a given factual context, the court must analyze the nature of the questioned conduct and the effect upon the parties in addition to appraising the sovereign's role." The defendants have the burden of establishing that the act of state doctrine is applicable. *Dunhill, supra,* 425 U.S. at 691. That burden is an onerous one, as our courts have been chary in dismissing cases on act of state grounds. As stated in *OPEC,* "the decision to deny access to judicial relief is not one we make lightly." Indeed, courts have always imposed a heavy burden of proof on a party who claims that he should be immunized from liability for acts which were admittedly illegal.

The Court of Appeals' misplaced reliance on *American Banana v. United Fruit Co.*, 213 U.S. 347 (1909) is the basis for its ruling. The circumstances of the present controversy are radically different from those presented in *American Banana, supra,* and the doctrine there approved is not controlling. The court below admits that subsequent cases have severely limited the application of *American Banana; e.g., Continental Ore Co. v. Union Carbide & Carbon Corp., supra; United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927); *U.S. v. Aluminum Co. of America* (Alcoa), 148 F.2d 416 (2nd Cir. 1945); *Timberlane Lumber Co. v. Bank of America N.T. & S.A.*, 549 F.2d 597 (9th Cir. 1976).

American Banana, supra, is actually an Act of State Doctrine case. In *American Banana,* the Supreme Court refused to challenge the government of Costa Rica by holding that the seizure of an American's property was illegal where the courts of Costa Rica had already affirmed the seizure. The seizure was an act of state, and the U.S. court refused to sit in judgment on the act. In the case at hand, Montreal Trading is not asking the court to adjudicate the

validity of the acts of the Canadian government. Plaintiff is seeking redress for the independent acts of American defendants done in the U.S.—namely, agreeing not to increase potash production within the territory of the U.S., a violation of U.S. laws. Defendants's actions with regard to their U.S. production cannot be shielded by any claim of being forced to do so by the Canadian government.

Many Supreme Court cases have led to the erosion of *American Banana U.S. v. American Tobacco*, 221 U.S. 106 (1911); *U.S. v. Pacific Artie RY & Navigation Co.*, 288 U.S. 87 (1913); *Thomson v. Cayser, supra; U.S. v. Sisal Sales Corp., supra; U.S. v. Aluminum Co. of America*, 148 F.2d 416 (2nd Cir. 1945), *Continental Ore Co. v. Union Carbide & Carbon Corp., supra; Steele v. Bulova Watch Co.*, 344 U.S. 280 (1952).

The defendants here (and their co-conspirators) are all private corporations. This case falls squarely within the reasoning of the decision in *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1977), where an American lumber company charged that an American bank and two Honduran lumber companies conspired to prevent its Honduran subsidiaries from milling lumber in Honduras and exporting it to the United States. To effectuate their scheme, defendants had initiated judicial proceedings in Honduras against plaintiff's milling operation, which resulted in the shutdown of this operation by Honduran troops. The defendants argued that the act of state doctrine barred plaintiff's claims, because plaintiff's injuries resulted from acts of the Honduran government, and these acts took place in Honduras.

In reversing the lower court's dismissal of the complaint, the court noted that the plaintiff's complaint had not named Honduras or any Honduran government official as a defendant, "nor does it challenge Honduran policy or sovereignty in any fashion that appears on its face to hold any threat to relations between Honduras and the United

States." *Id.*, 594 F.2d at 608. The court stated that "[e]ven if the *coup de grace* to Timberlane's enterprise in Honduras was applied by official authorities, we do not agree that the doctrine necessarily shelters these defendants or requires dismissal of the Timberlane action." *Id.* at 605. The court explained that "[i]t is apparent that the [act of state] doctrine does not bestow a blank-check immunity upon all conduct blessed with some imprimatur of a foreign government." *Id.* at 606.* Here, the illegal acts at issue were committed by private domestic corporations within our own borders as well as abroad.

A recent case which is highly instructive with respect to the act of state issue is *United Nuclear Corp. v. General Atomic Co.*, 1980-81 Trade Cases ¶ 63,639 (N.Mex.Sp.Ct. 1980), *cert. denied*, 101 S.Ct. 1977 (April 20, 1981). In that case, defendant General Atomic Co., a member of an international uranium cartel, sought to justify its refusal to comply with the lower court's discovery orders on the basis of the act of state doctrine. The defendant relied on repeated statements by the Canadian government that it (a) "initiated" the formation of the cartel; (b) had thereafter "participated" in the cartel; (c) had "approved" of the participation of Canadian uranium producers in the cartel; and (d) had made a "specific written request" that

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See also, United States v. Vetco, Inc., 644 F.2d 1324 (9th Cir. 1981) where the court, relying heavily upon *Timberlane*, held that summonses issued by the IRS which requested the books and records of American corporations and their foreign subsidiaries should be enforced, notwithstanding defendants' assertions that compliance with the summonses would require them to violate Swiss law. The Swiss Penal Code provided that anyone who made a "business secret" available to a foreign governmental agency was subject to imprisonment. The court stated that there is "a strong American interest in collecting taxes from and prosecuting tax fraud by its own nationals operating through foreign subsidiaries" and declared that this American interest outweighed the Swiss interest in preserving the secrecy of business records. *Id.* at 1331.

Gulf participate in the Cartel.* 1980-81 Trade Cases at ¶¶ 77,404-77,405

Nevertheless, the court held that the defendant had only shown the "broad and vague outlines" of governmental participation in the cartel and had therefore failed to make out an act of state defense. *Id.* at ¶ 77,407. The court stated:

> [T]he initiation of the cartel and the participation therein by that [Canadian] Government are not sufficient alone to transform the cartel-related activities of a wholly-owned subsidiary of a corporation based in the United States into the sovereign acts of a foreign nation, and thus to immunize those activities from challenge in American Courts. *Id* at ¶ 77,405.

In language especially appropriate to the cases at bar, the court emphatically declared that "It is for the courts of this country, and not for the government of a foreign state, to determine whether *our* nationals took actions in *our* nation in violation of *our* laws." *Id.* at ¶ 77,406 (emphasis in original).

Thus, even assuming, *arguendo,* that defendants are correct in asserting that the decisions giving rise to the conduct complained of herein were made in Canada, the antitrust laws should be applied here nevertheless, because much of that conduct occurred in the United States, and it had a "substantial and direct impact on our marketplace." As the court stated in *Industrial Investment Development Corp. v. Mitsui & Co.,* 594 F.2d at 55:

> The objective sought by passage of the Sherman Act is preservation and maintenance of effective competition in this country . . . To provide an act of state shield to business entities whose activities happen to reach beyond United States soil would thwart this objective.

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*Defendant General Atomic Co. was a partnership comprised of Gulf and Scallop Nuclear Corp.

In addition, in *Steel v. Bulova Watch Co., supra,* the Supreme Court disallowed such a comity defense where the Mexican government nullified a patent registration before the case reached the U.S. Supreme Court. "There is no conflict which might afford petitioner a pretext that such relief would impugn foreign law." *Id.* at 289. In the case at bar, Canada itself held the prorationing price conspiracy unconstitutional according to Canadian law.

2. The Sovereign Compulsion Defense is Inapplicable to This Case

a. Defendants Were Not Specifically "Compelled" to Do Any of the Acts Which are the Subject of the Complaint

Comity concerns are not present in this case by reason of the sovereign compulsion defense, either. This defense, which is a corollary of the act of state defense, provides that if a foreign government compels certain conduct within its own territory, that conduct cannot give rise to antitrust liability. There is no such evidence in the entire record of this case.

The sovereign compulsion doctrine has always been very narrowly construed. It is well established that "mere governmental approval or foreign governmental involvement which the defendants had arranged does not necessarily provide a [sovereign compulsion] defense." *Timberlane, supra,* 549 F.2d at 606. As the Third Circuit aptly stated in *Mannington Mills v. Congoleum Corp., supra,* "Where the governmental action rises no higher than mere approval, the compulsion defense will not be recognized. It is necessary that foreign law must have coerced the defendant into violating American antitrust law." 595 F.2d at 1293. Similarly, in *United Nuclear Corp. v. General Atomic Co., supra,* the court stated that it is "well-settled that the mere fact that a foreign government approved, authorized, tolerated, encouraged, aided or participated in

the anti-competitive actions of a private individual or corporation does not necessarily provide an act of state defense." 1980-81 Trade Cases at ¶ 77,405. *Accord, In re Uranium Antitrust Litigation*, 617 F.2d 1248, 1254, n. 21 (7th Cir. 1980).

This Court has held on at least two occasions that the mere acquiescence or approval of a foreign sovereign does not shield a defendant from antitrust liability. In *United States v. Sisal States Corp., supra,* the government alleged that various American banks and corporations and a Mexican corporation had conspired to eliminate competition in the importation of sisal. By means of favorable legislation secured by the defendants in Mexico, the defendant Mexican company, which was financed by the American banks, became the sole purchaser of sisal from Mexican producers, and defendant Sisal Sales Corporation (an American company) became the sole importer of sisal into the United States. The defendants argued that the Mexican government's involvement in the activities at issue immunized them from liability under the American antitrust laws, but this Court disagreed, stating:

> The United States complain of a violation of their laws within their own territory by parties subject to their jurisdiction, not merely of something done by another government at the instigation of private parties. True, the conspirators were aided by discriminating legislation, but by their own deliberate acts, here and elsewhere, they brought about forbidden results within the United States. They are within the jurisdiction of our courts and may be punished for offenses against our laws. *Id.* at 276.

This Court addressed this issue again in *Continental Ore Co. v. Union Carbide and Carbon Corp., supra.* In that case, plaintiff, a trader in various metals, alleged that Union Carbide's Canadian subsidiary, which had been appointed by the Canadian government as its exclusive

agent for the purchase of vanadium, had used its position to eliminate the plaintiff from the Canadian market by refusing to purchase plaintiff's vanadium. The Court stated that the defendants "are not insulated by the fact that their conspiracy involved some acts by the agent of a foreign government." *Id.* at 706. Even though it was argued by defendants that, in making its discriminatory purchases, the Canadian company was acting within the discretionary powers granted to it by the Government and in a manner permitted by Canadian law, the Court stated that there was "nothing to indicate that such law in any way *compelled* discriminatory purchasing . . ." *Id.* at 707 (Emphasis added).

It is undisputed that the defendants were not compelled to take the actions complained of herein and are now attempting to "hide behind the cloak of foreign law." There is no basis for a sovereign compulsion defense either factually or legally, and, accordingly, comity concerns do not arise.

b. The Sovereign Compulsion Defense Does Not Shield Illegal Actions Performed in the United States

The sovereign compulsion defense most certainly does not extend immunity to actions which are committed within the United States. In *United States Nuclear Corp. v. General Atomic Co., supra,* the court declared:

> Although the compulsion may have occurred in Canada, it is the acts that are compelled, rather than the compulsion itself, that are at issue in the present litigation. The act of state doctrine must apply to those acts, if it is to apply at all.
>
> *We cannot agree with the proposition that if a foreign state compels an American corporation to take actions in the United States which are intended to and do have severe adverse consequences to free and*

> *fair trade in the United States, the American corporation is therefore immunized from the full force of the laws of its own sovereign.* To hold otherwise would render asunder the "cornerstones of this nation's economic policies"—the antitrust laws. 1980-81 Trade Cases at ¶ 77,409 (emphasis added).

As in *Continental Ore and Sisal,* the conspiracy in the case at bar was laid both without and within the U.S. However, in the case at hand, the acts of defendant U.S. corporations in furtherance of the conspiracy were in the U.S. As stated in *Sisal* by the defendants' "own deliberate acts, here and elsewhere, they brought about forbidden results within the U.S. . . . and may be punished for offenses against our laws." *Id.* (Sisal) at 275-276, 47 S.Ct. at 593. Similarly, in *Linseman v. World Hockey Ass'n.,* 439 F.Supp. 1315 (D.Conn. 1977), the court noted that "given the fact that the rationale for the doctrine is to foreclose judicial review of acts of foreign governments which occur 'on their own soil', *Alfred Dunhill of London, Inc. v. Cuba,* 425 U.S. 682, 697 (1976) . . . it would be startling to find that it has application to acts occurring on United States soil." 439 F.Supp. at 1325. Therefore, the court in *Linseman* concluded that:

> [T]he act of state doctrine shields only conduct which is perpetrated within the territorial boundaries of the foreign country. The doctrine cannot be used to excuse the commission of illegal acts within the territorial boundaries of the United States. *Id.* at 1324

Any corporations (American or foreign) which commit illegal actions on American soil which affect American commerce should not be allowed to immunize themselves by claiming that they were merely "following orders" from a foreign sovereignty, thus causing comity concerns. Allowance of such a defense would obviously be inconsistent with the substantial American interest in enforcing the national policy in favor of competition. And, in addition, it would reward the defendants for being "clever." As noted, supra, when Thatcher proposed a secret meeting of all the pro-

ducers in the world, "Nelson White of IMC had told him that it would be necessary for the Premier to order the attendance of the U.S. producers to avoid legal problems."

B. The Decision By The Court Below That The Petitioner, Although A "Victim" Of The Conspiracy, Nonetheless Lacks Standing To Sue Is In Conflict With This Court's Prior Decisions And Threatens The Private Enforcement Of The Antitrust Laws

An inability to secure supply by reason of an unlawful cartel agreement to create a shortage is "precisely the type of loss that the claimed violations of the antitrust laws should be likely to cause." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969). And, as a matter of common sense and law, *Continental Ore v. Union Carbide and Carbon Corp.*, 370 U.S. 690 (1962), a person who cannot, by reason of the conspiracy, secure supply is not and could not be "too remote." To the contrary, such a person is *more* directly injured than the purchaser who received supply, but at the inflated fixed price. The person who receives supply may at least stay in the business and, possibly, pass on the inflated price. The person who is denied supply altogether is totally excluded from the market. As stated by one of the defendants, the conspiracy permitted him "to be somewhat selective" and "to weed out . . . customers." (TR. 896). To say, as did the Court below, that those customers who were "weeded out" lack standing, is to reward such cartel agreements for being so successful while punishing the potential purchasers for being the front line "victims."

No court up to this time has ever held that such an obvious, direct "victim" lacks standing to sue, no matter what standing test is used.

If such a rule were permitted to exist, combinations and cartels would be encouraged to create artificial shortages and enhance prices because the persons most directly injured by such agreements, the parties denied supply where supply exists, would be powerless to do anything about it.

This Court has held that "allegations adequate to show a violation and . . . that plaintiff was damaged thereby are all the law requires." *Radiant-Burners, Inc. v. People's Gas, Light and Coke Co.*, 364 U.S. 656 (1961). Not only does the decision below conflict with the *Radiant-Burner* case and others, supra, but it also establishes such a novel and important rule that should only be done by this Court, if at all.

C. The Application, If At All, Of The Trading With The Enemy Act As A Complete Defense To An Antitrust Violation Was Not Only Prejudicial And Inflammatory But Also Raises Important Public Policy Questions

The Court of Appeals did not decide this important issue, although it was the only issue raised by the petitioner.

After an incredibly irregular course of proceedings, supra, the Court below gave the following instruction to the jury:

> Two United States laws, the Trading With The Enemy Act and the Export Administration Act, prohibited the defendants during the relevant time period from directly or indirectly selling potash to North Korea. If you find that the plaintiff intended to resell to North Korea any of the potash which it sought to purchase from the defendants, then you must find that the plaintiff was not damaged by the defendants' conduct with respect to that transaction. TR 1113).

The instruction should not have been given at all as plaintiff repeatedly argued. It was not only inapplicable, it was obviously prejudicial and inflammatory.

The plaintiff here is a Canadian corporation. This Court encourages its suit. *Pfizer Inc. v. India*, 98 S.Ct. 584 (1978).

There is no evidence that the plaintiff intended to violate any law—although the instruction clearly implies otherwise. The fact of the matter is that *even if* the plaintiff did not intend to do a lawful act, that could *not* be

an antitrust defense. The theory of this rule is that the plaintiff may be susceptible to action by the government or some other party, but the antitrust defendant cannot use it as a defense. *Fashion Originators Guild v. FTC*, 312 U.S. 457 (1947); *Kiefer-Stewart Co. v. Joseph Seagram*, 340 U.S. 211 (1951); *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968).

Thus, even if it were illegal for the plaintiff to sell to North Korea, which it was not, it could never be a defense to the plaintiff's case without directly challenging the binding authority of this Court to the contrary.

The Trading With The Enemy Act specifically requires "knowledge" as an element of a violation. It was not shown, nor is it the case, that the defendants based their refusal to deal in whole or in part on the Trading With The Enemy Act. Consequently, the Trading with the Enemy Act cannot, as a matter of law, be used by the defendants as a justification for their refusal to deal. In *Eastman Kodak v. Southern Photo Materials, Inc.*, 273 U.S. 359, 375, 378 (1926) this court specifically held that defendant's lack of knowledge of plaintiff's actions rendered its' refusal to sell unjustified. Yet the instruction in question precisely led the jury to believe that the refusal was justified. Also see *Pacific Trading Co. v. Mouton Rice Mill Co.* 184 F.2d 141 (1950).

In the same vein, respondents may not use an *ex post facto* excuse as a reason for refusal to deal where the evidence shows that the conspiracy was the only reason. As in *Pacific Trading* an invalid reason is unjustified. And there is authority that defendant may not rely on a non-assigned reason for such a refusal to deal. *Ohio and Miss. Ry Co. v. McCarthy* 96 U.S. 158 (1877).

The necessity of a proper foundation applies equally to damages as well as liability. *Eastman Kodak, supra*, at 378, 379. It was perfectly legal for the plaintiff to sell to North Korea. Thus, in absence of the conspiracy, the plaintiff would have been supplied. And having been supplied,

it was legal for *him* to sell to North Korea. Having discovered, *ex post facto*, that the plaintiff intended to sell to North Korea, the defendants *cannot*, as a matter of law, then attempt to set up that intention as a justification for their refusal or escape the payment of the lawful profits the plaintiff would have made. *Eastman Kodak, supra.*

The necessity of a foundation was particularly necessary in this case because the evidence showed that the defendants were not concerned in the least about the Trading With the Enemy Act. (TR 849-850).

The undisputed evidence is that, pursuant to the conspiracy, all sales of potash to countries other than Canada and the United States went through Campotex. Campotex was a private corporation owned in part by the defendants. The undisputed evidence is that Campotex sold to Cuba during the relevant time period (TR. 438) and Cuba, like North Korea, was an embargoed country under the Act. Thus, if the defendants' arguments in this trial were deemed to be made in good faith—and that knowledge of the ultimate destination is "irrelevant"—then the defendants violated the Act.

The Court below erroneously instructed the jury that the refusal by defendant, without *any* knowledge of plaintiff's intentions, was justified. This is dramatically shown by their note to the Court during deliberations:

> We understand that there can be *no conspiracy if* the plaintiff intended to sell to North Korea.

That "understanding" by the jury was clearly *wrong*, and the Court was required to so inform the jury. The plaintiff's intention had absolutely *nothing* to do with whether the defendants conspired. In addition, *even* the defendants did not go so far as to claim that the plaintiff's intention justified an otherwise illegal conspiracy. Thus, even if the instruction were proper, which it was not, the Court erred by not properly stating the law to the jury in response to their note.

Instruction No. 39 does not even correctly state the body of law referred to as the Trading With the Enemy Act, even if it were applicable.

There is no one body of law containing all provisions covering trading with certain countries which have been designated "enemies" of the United States. In this sense the term Trading With the Enemy Act is a misnomer. What is and what is not permitted in trading with foreign countries can only be determined by reading a number of statutes, rules, and regulations together. These consist of 50 U.S.C. App. § 5(b); 50 U.S.C. App. § 2401; 91 Stat. 1625; 31 C.F.R. § 1500 *et seq.*; and 15 C.F.R. §§ 368-99. It should be apparent that this represents a huge body of law, not integrated and sometimes inconsistent, which has been enacted over a long period of time to accomplish different purposes.

Instruction No. 39 is not a direct quote from any part of this huge body of law. Instead it is the verbatim instruction submitted by the defendants which purports to summarize this huge body of law. It is akin to a half-page summary of the Internal Revenue Code—it just can not be done. As a result the instruction is grossly misleading and inaccurate.

The real basis for the defendants' trading with the enemy argument are two sections in the Code of Federal Regulations: 31 C.F.R. § 500 *et seq.* (1978) and 15 C.F.R. §§ 368-99 (1978). Thus respondents are relying on regulations in effect in 1978. There was no showing in the district court that these regulations were the same or even in effect at all in 1973-74, the years the plaintiff sought to trade potash.

Moreover, the trading with the enemy regulations were enacted to promote national security by forbidding trade in arms, munitions and strategic information to certain designated countries. 31 C.F.R. 505.10. The regulations also prohibit certain gold, silver, currency and securities transactions. 31 C.F.R. § 500.201. These regulations have

nothing to do with potash to be used as agricultural fertilizer.

Instruction No. 39 is directly contrary to other provisions in the very acts which the respondents rely on for support.

31 C.F.R. 515.10 deals with transactions between foreign countries in which U.S. companies are involved. This would cover this case where potash would be moving between Canada and North Korea where the Canadian seller might be affiliated with a U.S. corporation (TR. 674). Such a transaction would not be prohibited under 31 C.F.R. § 500.10 unless the commodity involved is specifically embargoed by the U.S. Department of Commerce. Potash is not listed as such a commodity. 15 C.F.R. 399.

Similarly the transaction involved in this case would also fall within 50 U.S.C. App. § 2401 *et seq.* Section 2403 (f)(i) of the Act exempts agricultural products, such as potash, from control. Therefore this provision would allow the transaction which is directly contrary to the way the instruction reads.

All of this discussion, and Instruction No. 39 itself, presumes plaintiff would have sold potash only to North Korea. However, this is directly contrary to the evidence. The plaintiff testified, based on his experience and prevailing prices, he would have sold potash to customers in Japan and the United States and possibly other countries as well. (TR. 432, 437). Clearly there would have been no prohibition on these sales as trading with the enemy.

Yet the jury understood (as evidenced by its note) that if plaintiff *intended* to sell *any* potash to North Korea, irrespective of whether the sale to North Korea was consummated or whether plaintiff could have sold other customers, the jury could not find for the plaintiff on any of its claims. This understanding was clearly erroneous and is contrary even to the literal language of the instruction which would preclude damages only on those transactions

with North Korea, allowing the plaintiff to recover on other claims.

Further, plaintiff is and was at all times a Canadian corporation operating in Canada. The U.S. regulations do not purport to apply to Canadian businesses as indeed they cannot. Canadian businesses, like the plaintiff, are regulated by Canadian laws. Thus, the instruction should not have been given.

One final fact was totally ignored by the District Court which also necessitated that the instruction not be given. Certain co-conspirators (not named as defendants in the case) are Canadian companies operating solely in Canada. Kalium corporation is one such co-conspirator.

Plaintiff attempted to buy potash from Kalium but Kalium also refused pursuant to the conspiracy to withhold supply. Just as the plaintiff was beyond the reach of any U.S. regulations, so too is Kalium, a Canadian corporation. Yet Instruction No. 39 makes it unlawful for one Canadian corporation (plaintiff) to buy potash from another Canadian corporation (Kalium).

Finally, the jury's note to the Court makes clear that a verdict in defendants' favor was based solely on Instruction No. 39. It is clear beyond doubt that the instruction prejudiced the petitioner.

CONCLUSION

For the foregoing reasons petitioner respectfully prays that the Court grant the writ and review the judgment of the Court below.

Dated, January 12, 1982

Respectfully submitted,
JOSEPH M. ALIOTO
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Attorneys for Petitioners

(Appendices follow)

APPENDIX A

Montreal Trading Ltd.,
Appellant,
vs.
Amax, et al.,
Appellees.

Before BARRETT, LOGAN and SEYMOUR, Circuit Judges.

LOGAN, Circuit Judge.

Montreal Trading Ltd., a Canadian corporation, brought this antitrust action against several United States potash producers, alleging that Montreal Trading was unable to purchase potash to sell to its customers because the defendants were engaged in a concerted refusal to deal with Montreal Trading and had deliberately limited potash production to drive up prices. Montreal Trading now appeals an adverse jury verdict finding that it suffered no damages. It argues on appeal the impropriety of a jury instruction precluding damages for any potash withheld from Montreal Trading that it planned to resell to customers in North Korea. On appeal, defendants argue that the trial court lacked subject matter jurisdiction over the complaint.

Montreal Trading trades commodities in the international market. The defendants in this case, Amax Inc., Amax Chemical Corporation, Duval Corporation, Duval Sales Corporation, Ideal Basic Industries, Inc., and International Minerals & Chemical Corporation, are all engaged in potash mining and production in the two sites in North America where such production exists: New Mexico and Saskatchewan, Canada.

In November 1973 Montreal Trading sent a Telex message to the Canadian offices of several of the defendants requesting prices for 50,000 tons of potash, and sent additional inquiries to other Canadian producers. The companies generally responded that they could not fill Montreal Trading's order, with some companies referring expressly to a shortage of potash. One producer expressed

interest in negotiating until it discovered Montreal Trading was going to export the potash; it then referred Montreal Trading to Canpotex, a governmentally-established Canadian association that controls all exports of Canadian potash to countries outside North America. Montreal Trading did not negotiate with Canpotex, and after receiving rejections or no response to its other inquiries, it made no further efforts to purchase potash.

We read Montreal Trading's complaint as alleging that its inability to purchase potash resulted from both a concerted refusal of United States producers to deal with it, and a conspiracy among the producers, cooperating with the Saskatchewan government, to create a shortage of potash. The parties do not dispute that during the time periods critical to this case the Saskatchewan government prorationed and otherwise limited the production and exportation of Canadian potash. Prior to doing so, Saskatchewan's Premier, Ross Thatcher, visited New Mexico seeking assurances from that state's governor and from producers there that New Mexico potash production would not be increased in the wake of Canada's reduction. The parties vigorously dispute whether the United States producers agreed to limit production. While it is not dispositive of the issue, we note that the government brought Sherman Act criminal proceedings against the defendants and they were acquitted. *See* United States v. Amax Inc., 1977-1 CCH Trade Cas. ¶ 61,467 (N.D. Ill. 1977).

At trial the defendants maintained that Montreal Trading could claim no damages from any inability to purchase potash since it intended to resell to customers in North Korea in violation of the Foreign Assets Control Regulations, 31 C.F.R. § 500.201(b). These regulations, adopted pursuant to the Trading with the Enemy Act, 50 U.S.C. App. § 5(b), prohibit any United States company, or any business that is owned or controlled by a United States business organization, wherever located, from selling any products whatsoever, directly or indirectly, to North

Korea. *See* 31 C.F.R. § 500.329. Pursuant to this reasoning, the judge instructed the jury as follows:

> "Two United States laws, the Trading with the Enemy Act and the Export Administration Act, prohibited the defendants during the relevant time period from directly or indirectly selling potash to North Korea. If you find that the plaintiff intended to resell to North Korea any of the potash which it sought to purchase from the defendants, then you must find that the plaintiff was not damaged by the defendants' conduct with respect to that transaction."

(R. XIV, 1113).

Montreal Trading alleges that the court's instruction was improper because the defendants had not even inquired whether Montreal Trading would resell to North Korean customers, because Montreal Trading might have resold part of the potash to customers outside North Korea, and for other reasons. We do not reach that issue, however, because we agree with defendants' contention that the district court lacked subject matter jurisdiction in this action.

As regards Montreal Trading's claim of an inability to purchase because defendants limited production as part of a price fixing conspiracy, defendants argue that as one who never purchased potash, Montreal Trading lacks standing to sue since any injury it suffered because of defendants' actions was too remote; and that only those who purchased potash at the artificially high price would have suffered a sufficiently direct injury to have standing to bring an action. As regards Montreal Trading's claim of a concerted refusal to deal, defendants argue that a refusal to sell Canadian potash to a Canadian company is not a transaction in "trade or commerce among the several states or with foreign nations," 15 U.S.C. §§ 1 and 2, and has too insignificant an effect on such commerce to justify federal court jurisdiction. We agree with both of these arguments.

The principal thrust of Montreal Trading's complaint is that defendants conspired to limit potash production in order to raise prices, and they were so successful that Montreal Trading was unable to buy potash it could have resold at a profit. To determine whether one alleging an inability to purchase a product has suffered an injury compensable under the antitrust laws, we must begin with the language of the statute:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained . . . ."

15 U.S.C. § 15.

While the statutory language is broad, the Supreme Court has held that the injury must result from the type of harm the antitrust laws were intended to prevent. *See* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977). In addition, the Supreme Court has endorsed limitations on *standing* to sue for antitrust injury, an issue it has termed analytically distinct, Illinois Brick Co. v. Illinois, 431 U.S. 720, 728 n.7 (1977), and has generally left it to the lower courts to formulate those limitations. The circuits have, for the most part, either limited standing to those "directly injured" or to those "in the target area" of the antitrust violation. *See In re* Multidistrict Vehicle Air Pollution Litigation M. D. L. No. 31, 481 F.2d 122, 126-28 (9th Cir.), *cert. denied*, 414 U.S. 1045 (1973) (collecting both direct injury and target area cases); Berger & Bernstein, *An Analytical Framework for Antitrust Standing*, 86 Yale L.J. 809, 313-35 (1977). This Circuit has expressed the standing limitation in terms of "direct injury" and "proximate cause." *See* Comet Mechanical Contractors, Inc. v. E. A. Cowen Constr., Inc., 609 F.2d 404 (10th Cir. 1980); Farnell v. Albuquerque Publishing Co., 589 F.2d 497 (10th Cir. 1978); Reibert v. Atlantic Richfield Co., 471 F.2d 727 (10th Cir.), *cert. denied*, 411 U.S. 939 1973).

A price fixing conspiracy is certainly "aimed" at those who purchase the product at the inflated price; their injury is more direct and more proximately caused than those who are unable to purchase due to product scarcity. But a conspiracy to withhold goods from the market may also injure nonpurchasers and we must determine whether a nonpurchaser in Montreal Trading's position should be treated as "directly injured."

The two purposes of the treble damage remedy are "to compensate victims of antitrust violations for their injuries" and to deprive violators of "the fruits of their illegality" *Illinois Brick,* 431 U.S. at 746. Here, we note that while nonpurchasers may be considered victims of the conspiracy, the alleged conspirators gained no "fruits" from nonsales except to the extent that sales volume had to decline if they were to succeed in charging inflated prices. Other factors that merit consideration are whether a grant of standing might result in "potentially disastrous recoveries by those only tenuously hurt," Jeffrey v. Southwestern Bell, 518 F.2d 1129, 1131 (5th Cir. 1975), and whether the fact of a party's injury, as opposed to the amount, would be inherently speculative.[1] We find these considerations dispositive. If nonpurchasers who have never dealt with a defendant could recover, a seemingly unlimited number of plaintiffs could assert a virtually unlimited quantity of lost purchases, perhaps exceeding the potential output of the entire industry. With a treble damages entitlement, the result could be multiple recoveries and total damage awards wholly out of proportion with "the fruits of the illegality," easily bankrupting the named defendants. *See Illinois Brick,* 431 U.S. at 730; Mid-West Paper Prods.

---

[1]A party must show with some certainty that it suffered injury as a result of the defendants' actions, but once it shows injury, the amount of damages can be estimated. Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 562-66 (1931); see Mid-West Paper Prods. Co. v. Continental Group, Inc., 596 F.2d 573, 584-85 (3d Cir. 1979)

Co. v. Continental Group, Inc., 596 F.2d 573, 586-87 (3rd Cir. 1979).

When the nonpurchaser can show a regular course of dealing with the conspirators, injury may not be inherently speculative. *Cf. Illinois Brick*, 431 U.S. at 733 n.13 (noting that a direct purchaser can claim injury from lost sales due to a price fixing conspiracy). But when, as here, the nonpurchaser has no prior course of dealing with any defendant, we will remain unsure about many things, including: whether the purchase would have been made from one of the conspirators or from one of their competitors; what quantity would have been purchased; what price would have been paid; and at what price resale would have occurred. In the instant case we would also be uncertain whether the potash producers would have inquired about the identity of Montreal Trading's customers before making the sale; whether, if asked, Montreal Trading could have truthfully replied that part of the purchase was allocated to customers outside North Korea; whether Montreal Trading would have had the funds needed to make the purchased; and whether an alleged shortage of railroad cars would have aborted the transaction. Given these problems and uncertainties, and that actual purchasers exist who were more directly injured by the conspiracy and who could be expected to police the conspiracy as "private attorneys general," *see* Hawaii v. Standard Oil Co., 405 U.S. 251, 262 (1972), we believe nonpurchasers should be denied standing to sue, at least when they lack a past course of dealing with the conspirators. *Cf.* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 739-49 (1975) (in Rule 10b-5 actions, nonpurchasers are denied standing because of fear of nuisance suits and speculative nature of proving causation); *Mid-West Paper Products*, 596 F.2d 573 (purchasers from nonconspirators are denied standing to sue the conspirators when their alleged injury is due to nonconspirators raising their prices under a "price umbrella" erected by conspirators).

That leaves us with the alleged concerted refusal to sell to Montreal Trading. The usual concerted refusal to deal case is a boycott aimed at suppressing competition from the competitors of the conspirators. *See, e.g.*, Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600 (1914). Montreal Trading's complaint does not fit the usual boycott analysis; the defendants' unwillingness to sell to Montreal Trading appears to be merely a byproduct of production cutbacks. Nothing in the record shows defendants had a special animosity toward Montreal Trading or other commodity traders; nor does the record show defendants intended to harm any particular competitor. If that is so, this case does not involve a concerted refusal to deal, but only a conspiracy to raise prices by restricting production; Montreal Trading was not a special target but only a victim in the same sense as anyone else unable to purchase because of the product scarcity.

Nevertheless, we will read Montreal Trading's complaint expansively and treat it as alleging a concerted refusal to sell to Montreal Trading, perhaps singling out Montreal Trading because it had no established purchaser relationship with any of the defendants. In such posture we hold the refusal had insufficient contacts with and effects upon commerce within the United States to justify federal court jurisdiction. Congress did not intend to police every conspiracy in the world involving a conspirator who may be reached by federal court service of process. United States v. Aluminum Co. of America, 148 F.2d 416, 443 (2d Cir. 1945) (Alcoa).

The extraterritorial reach of American antitrust laws is limited, first, to acts that affect trade or commerce among the several states or with foreign nations. *See* sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2. But even if the alleged activity affects interstate or foreign commerce, *see Alcoa*, 148 F.2d at 443, we must heed comity concerns. The Supreme Court first addressed these concerns in *American Banana Co. v. United Fruit Co.*, 213

U.S. 347 (1909), involving a United States corporation that allegedly convinced the government of Costa Rica to seize the property of its competitor. Justice Holmes, writing for the Court, held there was no cause of action in the United States. He took an extremely territorial approach, declaring that to assume jurisdiction over a case in which all actions occurred outside of our country, "would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent." *Id.* at 356.

Subsequent cases, while not expressly repudiating the *ratio decidendi* of *American Banana*, have severely limited its application. *See, e.g.*, Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962); United States v. Sisal Sales Corp., 274 U.S. 268 (1927); *Alcoa*, 148 F.2d 416; Timberlane Lumber Co. v. Bank of America, 549 F.2d 597 (9th Cir. 1976). Nevertheless, the concern for respecting the comity of other nations continues, as evidenced by most of the jurisdictional tests our courts utilize when these international elements are involved.

The principal purposes of the antitrust laws are protection of American consumers and American export and investment opportunities. If American interests are at stake we may impose liability for conduct outside our borders that has consequences within our borders. *See Alcoa*, 148 F.2d at 443. When the contacts with the United States are few, the effects upon American commerce minimal, and the foreign elements overwhelming, however, we do not accept jurisdiction. We believe that the analysis set forth in *Timberlane Lumber Co. v. Bank of America*, 549 F.2d at 613-15, contains the proper elements for consideration. To support jurisdiction of an American court, plaintiff must first show that the challenged activity had an actual effect on United States commerce. Then we must decide if "the interest of, and links to, the United States—including the magnitude of the effect on American foreign commerce—are sufficiently strong, vis-a-vis those of other

nations, to justify an assertion of extraterritorial authority." *Id.* at 613.

Concerning this balancing between United States and extraterritorial contacts and interests, the Restatement (Second) of Foreign Relations Law of the United States § 40 (1965) outlines the following factors as pertinent:

> (a) vital national interests of each of the states,
>
> (b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person,
>
> (c) the extent to which the required conduct is to take place in the territory of the other state,
>
> (d) the nationality of the person, and
>
> (e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.

Kingman Brewster, in formulating a "jurisdictional rule of reason," listed the following factors:

> (a) the relative significance to the violations charged of conduct within the United States as compared with conduct abroad; (b) the extent to which there is explicit purpose to harm or affect American consumers or Americans' business opportunities; (c) the relative seriousness of effects on the United States compared with those abroad; (d) the nationality or allegiance of the parties or in the case of business associations, their corporate location, and the fairness of applying our law to them; (e) the degree of conflict with foreign laws and policies, and (f) the extent to which conflict can be avoided without serious impairment of the interests of the United States or the foreign country.

K. Brewster, Antitrust and American Business Abroad 446 (1958). Although these lists may not be all-inclusive, *see* Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1297-98 (3d Cir. 1979) (listing a different set of factors), they embody proper factors for consideration.

We believe that United States interests are minimal in protecting Montreal Trading from a concerted refusal of Canadian subsidiaries to sell it Canadian potash for delivery in Canada, which it would resell in part or in whole to customers in North Korea. Plaintiff, Montreal Trading, is a one-man company with its office in Montreal. While Montreal Trading argues it was interested in potash wherever produced, and did not limit its requests to Canadian production, the evidence is overwhelming that it sought only Canadian potash and delivery was to take place in Canada. Montreal Trading contacted only firms that had Canadian mines. (R. X, 417, 450-55). Montreal Trading contacted United States offices only after the Canadian operations referred it there as the appropriate business channel. (R. X, 417). In at least one instance a United States company had minesites in both countries, and Montreal Trading specified that it sought Canadian potash. (Pl. Ex. 376.40). Additionally, the owner of Montreal Trading testified that he knew from experience he could not purchase United States products for resale in North Korea. (R. X, 467).

The trial court left the jurisdictional question to the jury. It instructed the jury that in order to find a violation of the Sherman Act the jury must find "the refusal to sell *Canadian* potash to plaintiff has an effect on or was intended to affect the price or supply of potash in the United States." (R. XIV, 1098-99) (emphasis added). If Montreal Trading thought this instruction improperly limited the jury's consideration to the sale of Canadian potash, it should have objected to the instruction at trial. It raised no objection. Although our Court may pass on matters where the proper resolution is beyond a doubt or where a manifest injustice will otherwise result, Singleton v. Wulff, 428 U.S. 106, 121 (1976), we are to use our power to consider errors sparingly and in the interests of justice, Prebble v. Brodrick, 535 F.2d 605, 612 (10th Cir. 1976). We have reviewed the documents and testimony, and are of

the opinion that there was no manifest injustice here and that the trial court was correct in limiting jurisdictional consideration to the sale of Canadian potash.

Montreal Trading has not shown more than a speculative and insubstantial effect on United States commerce of a refusal by Canadian subsidiaries to sell Canadian potash to a Canadian company, at least a part of which was for resale to buyers in North Korea. It is true that the United States imports potash from Canada, and exports its own potash to various countries. We could speculate that a restraint on trade of any commodity this country imports or exports, or even uses, could have *some* effect on commerce in the United States. But we believe that neither the Constitution nor the Sherman Act was intended to give such far reaching power. The Department of Justice *Antitrust Guide for International Operations* suggests that we should not take jurisdiction over foreign activities of United States firms "which have no direct or intended effect on United States consumers or export opportunities," for such jurisdiction would be beyond the scope Congress intended, and "could encroach upon the sovereignty of a foreign state without any overriding justification based on legitimate United States interests." Antitrust and Trade Reg. Rep. (BNA) 799-E, at E-3 (1977).

Viewing this action as involving only a concerted refusal to deal with Montreal Trading, those acts defendants committed in the United States to restrict production, orchestrated by the Saskatchewan government, are simply not relevant. The only significant American involvement is that Montreal Trading might have resold part of the potash to customers in this country, and that American companies own the Canadian subsidiaries Montreal Trading contacted in its attempt to buy potash. Comity concerns outweigh any effect on United States commerce. Jurisdiction in the courts of the United States would be unjustified.

The appeal is therefore DISMISSED.

APPENDIX B

STATUTES INVOLVED

Section 4 of the Clayton Act (15 U.S.C. § 15) provides in pertinent part as follows:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained . . . .

Section 1 of the Sherman Act (15 U.S.C. § 1) provides, in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . .

Section 3 of the Trading With The Enemy Act (50 U.S.C. App. § 1 et seq.) provides in pertinent part that it shall be unlawful:

> (a) For any person in the United States, except with the license of the President, granted to such person, or to the enemy, or ally of enemy, as proved in this Act (sections 1-6, 7-39 and 41-44 of this Appendix), to trade, or attempt to trade, either directly or indirectly, with, to, or from, or for, or on account of, or on behalf of, or for the benefit of, any other person, with knowledge or reasonable cause to believe that such other person is an enemy or ally of enemy, or is conducting or taking part in such trade, directly or indirectly, for, or on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy.

Opposition

No. 81-1362

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

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Petitioner,

v.

AMAX INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

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February 10, 1982

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BRIEF IN OPPOSITION

Statement of the Case

In June 1976 respondents, all major potash producers, were indicted on charges of having conspired, in violation of Sections 1 and 2 of the Sherman Act, to restrict United States potash production and to fix the price of potash produced in the United States. After an eight-week trial in early 1977, all respondents were acquitted. *United States* v. *Amax Inc.*, 1977-1 Trade Cas. (CCH) ¶ 61,467 (N.D. Ill. 1977).

Promptly after the acquittal, the Government withdrew its companion civil complaint (76 Civ. 2393 (N.D. Ill.)).

Respondents then settled on a token basis a myriad of treble damage actions that had been filed after the indictment was returned, paying a total of some $3 million for a full release from a class of all direct purchasers of potash in the United States (*In re Potash Antitrust Litigation*, MDL 272 (N.D. Ill.)).

Several months later, in November 1977, petitioner filed this action in the District of New Mexico, tracking the charges of the indictment, claiming to have been boycotted by respondents, and demanding trial by jury. Trial was had, and the jury found for respondents.

The uncontroverted evidence adduced at trial established that petitioner was a one-man Canadian corporation doing business in Montreal, Canada (App. A1; Tr. 516-17)[1]; that petitioner had never bought, sold, or used potash (App. A2, A6); that in November 1973, petitioner sought to buy Canadian produced potash in Canada for export and resale to North Korea and was unable to do so (App. A1-2, A10); and that at the time in question, the level of Canadian potash production, the price of Canadian potash, and its export outside North America were controlled by the government of Saskatchewan, the sole location of Canadian production (App. A2). There was no evidence, direct or circumstantial, of any communication among the respondents about petitioner or its efforts to buy potash.

On appeal to the court of appeals, petitioner complained of a jury instruction to the effect that no damages could be recovered with respect to any loss of profits suffered by reason of its inability to resell potash to North Korea (App. A3). This instruction was given because the only proposed

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[1] "App." citations are to the appendices to the petition for certiorari; "Tr." citations are to the trial transcript.

resale of potash about which petitioner's principal testified at trial was to the government of North Korea (Tr. 445-47, 459, 509), and respondents, all United States corporations, were prohibited from selling potash for that purpose by the Trading with the Enemy Act, 50 U.S.C. app. §§ 1-44 (1976), and regulations thereunder, 31 C.F.R. § 500.201 (b)-(d) (1981), even though the potash was produced outside the United States.

The court of appeals did not rule on the challenged jury instruction, but held that the district court lacked subject matter jurisdiction and petitioner lacked standing to sue (App. A3-11).

Summary of the Argument

The petitioner's claim has nothing to do with United States commerce, and should have been dismissed before trial for lack of subject matter jurisdiction. Moreover, the alleged conspiracy about which petitioner complains could not have been the proximate cause of its alleged injury. Finally, petitioner's attempt to impeach the verdict of the jury it demanded is frivolous. Petitioner had a full hearing in the court of appeals, and there is no occasion for certiorari.

ARGUMENT

This Bizarre and Frivolous Case Presents No Question for Consideration by This Court.

This case was bizarre from its inception: the entire gravamen of petitioner's complaint was that it, a *Canadian*, was unable to purchase *in Canada* potash produced *in Canada* for export from *Canada* to *North Korea*. That complaint had nothing whatsoever to do with United States

domestic or foreign commerce and thus presented nothing for adjudication under the Sherman Act.

In so holding, the court of appeals did not renounce the jurisdiction of the "courts of the United States" over "international cartels" formed by American companies, as petitioner would have the Court believe by the first of its "questions presented." In fact, as the court of appeals noted, the jurisdiction of the "courts of the United States" was fully exercised with respect to any arguable impact of the alleged "international cartel" upon United States commerce in the trial of the Government's criminal case, in which respondents were acquitted (A2). The court of appeals simply and correctly held that *petitioner's* claim was not within that jurisdiction because it was based on dealings (or, more accurately, attempted dealings) entirely outside the stream of United States commerce (App. A6-11). This accords with settled law, as to which there is no conflict among the circuits. *See, e.g., United States* v. *Aluminum Co. of America,* 148 F.2d 416, 443 (2d Cir. 1945) (court of last resort); *Timberlane Lumber Co.* v. *Bank of America,* 549 F.2d 597, 608-615 (9th Cir. 1977); *Mannington Mills, Inc.* v. *Congoleum Corp.,* 595 F.2d 1287 (3d Cir. 1979); *National Bank of Canada* v. *Interbank Card Ass'n,* 1980-81 Trade Cas. (CCH) ¶ 63,836 (2d Cir. 1981); *U.S. Dep't of Justice, Antitrust Guide for International Operations, Antitrust & Trade Reg. Rep.* (BNA) No. 799, at E-2 (Feb. 1, 1977).

The second of petitioner's "questions presented," like the first, is not founded in the facts of this case. The production and pricing of Canadian potash were controlled by law by the government of Saskatchewan. That regulatory regime was the sole proximate cause of any shortage of Canadian potash, the product petitioner sought to buy. It is thus hardly surprising that the court of appeals, again following

established authority, held that any injury resulting from petitioner's inability to purchase Canadian potash was too remote in fact and law from an alleged restraint of United States potash production to be actionable, particularly when petitioner was not a consumer of potash and had never been in the business of purchasing potash for resale (App. A4-7). *Cf. Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977).[2]

Finally, the third of petitioner's "questions presented" is no more than a losing litigant's cavil about a clearly proper jury instruction. The instruction, quoted in full at page 25 of the petition, merely reflected the basic rule, recently reiterated by this Court in *Kaiser Steel Corp.* v. *Mullins*, 50 U.S.L.W. 4152 (U.S. Jan. 13, 1982), that the federal courts will not grant recovery on account of a transaction prohibited by positive law. This rule has nothing to do with an *"in pari delicto"* defense, and *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134 (1968), and the other cases cited at page 26 of the petition are inapplicable.

Moreover, far from having "denied the right to a jury trial," the instruction was carefully and narrowly worded, as petitioner concedes (Pet. 29-30). When the jury in-

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[2] Petitioner's devotion of more than half its argument (Pet. 14-24) to the act of state doctrine and "sovereign compulsion defense" is tilting at windmills. Respondents never claimed, nor did either court below suggest, that an otherwise unlawful restriction of United States potash production could be immunized or justified by the act or compulsion of Saskatchewan or any foreign sovereign. By the same token, the district court correctly charged the jury, without objection from petitioner, that respondents were not responsible at law for the Saskatchewan government's regulation of Canadian potash production (Tr. 1105).

Likewise, the ten pages of "material facts" recited by petitioner (Pet. 4-14) have never been found by any trier of fact, and their purport was rejected by the district court that tried the Government's criminal case, upon the record of which petitioner surprisingly relies.

quired about this instruction, the court responded by giving them the written instructions and did so *with petitioner's approval* (Tr. 1134-36). The verdict is not impeachable, *see* FED. R. EVID. 606(b); *McDonald* v. *Pless*, 238 U.S. 264 (1915), and the whole subject of the challenged instruction, arising as it does from the bizarreness of petitioner's case, is of no general or recurring consequence.

Petitioner, whose case should have been dismissed before trial, demanded and was afforded trial by jury. Petitioner lost, appealed, had a full hearing before a court of appeals, and lost again. While this sequence of events is disappointing to petitioner, it presents no occasion for the exercise of this Court's discretionary jurisdiction.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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Petitioner's Reply Brief

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REPLY MEMORANDUM FOR MONTREAL TRADING

Respondents' brief in opposition avoids the essential questions set forth by petitioner as to why certiorari should be granted. Respondents sidestep the issues because they must: the evidence and the law do not support any of their arguments.

1. Respondents first ignore the thrust of the jurisdiction question. The issue is whether the defendants' conduct affected the commerce of the United States, and, if so, whether a court may nonetheless refuse to exercise jurisdiction based upon notions of comity.

(a) Contrary to the binding authority of this Court, the respondents urge and the court below held that jurisdiction is to be determined by the effects resulting from "the refusal" to sell to the individual petitioner rather than by the effects resulting from the overall conspiracy to curtail production and raise prices in the Western Hemisphere, including the United States. Indeed, in *McLain v. Real Estate Board of New Orleans*, 444 U.S. 232 (1980), this Court went further and held:

> "To establish the jurisdictional element of a Sherman Act violation it would be sufficient for petitioners to demonstrate a substantial effect on interstate commerce generated by respondents' [business] activity. Petitioners need not make the more particularized showing of an effect on interstate commerce caused by the alleged conspiracy to fix commission rates, or by those other aspects of respondents' activity that are alleged to be unlawful." 444 U.S. at 242-243.

b. The respondents concede that the accepted applications of comity (Act of State, Sovereign Immunity and Sovereign Compulsion) do *not* apply to this case. (Brief in Opp., p. 5, ftnt. 2). Furthermore, the respondents, as they must, completely ignore the total failure of the court below to apply any comity test to the facts of this case. Even if the effects test of jurisdiction is to be expanded by the "comity concerns" listed by the court below when dealing with cartels, the facts in this case overwhelmingly balance in favor of the exercise of jurisdiction.

2. Respondents misstate the law when they argue that a Canadian who first sought Canadian potash (and then United States potash) in Canada cannot recover under

United States law. *Pfizer, Inc. v. India,* 434 U.S. 308 (1978) gives a foreign plaintiff a right of action under the Sherman Act. The obvious effects of the scheme on the United States have been demonstrated, and whether the original potash sought by petitioners was United States or Canadian is of no avail. In *Continental Ore v. Union Carbide and Carbon Corp.,* 370 U.S. 690 (1962) Canadian vanadium was in issue; in *U.S. v. Sisal Sales Corp.,* 274 U.S. 268 (1927) Mexican sisal; in *U.S. v. Aluminum Co. of America,* 148 F.2d 416 (2d Cir., 1945) Canadian and European ingot; in *Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398 (1964), Cuban sugar; in *Alfred Dunhill of London, Inc. v. Republic of Cuba,* 425 U.S. 682 (1976) Cuban cigars; in *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.,* 549 F.2d 597 (9th Cir., 1976) Honduran lumber; and in *Steele v. Bulova Watch Co.,* 344 U.S. 280 (1952) Mexican watches. In not one of these cases did a comity argument outweigh jurisdiction.

3. The only answer the respondents can give to the revolutionary ruling by the court below precluding admitted "victims of the conspiracy" from suing is to beg the ultimate question by asserting that "The production and pricing of Canadian potash were controlled by law and by the government of Saskatchewan . . . and was the sole proximate cause of any shortage . . ." (Brief in Opp., p. 4). Of course, respondents conspicuously avoid all the evidence to the contrary which amply demonstrates that the conspiracy was meant to and did in fact cause the shortage.

4. Respondents ignore whether the Trading With the Enemy Act is applicable at all; they sidestep whether it is a defense to an antitrust case; and they ignore the

prejudicially erroneous instruction by misrepresenting that the petitioner ratified it and seeks only to impeach a verdict.

The petitioner submits that the reason the respondents completely ignore the issue of the applicability of the Trading With the Enemy Act to this case is because it is not applicable and was inserted in this case solely for its prejudicial effect. Unless the appropriateness of the Act in this case is decided, the Act can be similarly used in a helter-skelter manner in a myriad of other cases involving the foreign trade and commerce of the United States.

Respondents, who assume that the Trading With the Enemy Act in fact applies and who further assume that it is a complete defense to an antitrust case, bootstrap their position by citing this Court's recent opinion in *Kaiser Steel Corp. v. Mullins*, 50 U.S.L.W. 4152 U.S. Jan. 13, 1982). Not only are their assumptions incorrect, but *Kaiser Steel*, contrary to the respondents' position, held that the Federal Courts will not sanction antitrust violations. To permit the respondents to use the Trading With the Enemy Act as an *ex post facto* defense would sanction their antitrust violations—the very result *Kaiser Steel* seeks to prevent.

5. Respondents, like the court below, totally ignore the prejudicially erroneous instruction which required the jury to exonerate the participants in the international cartel.

6. Respondents' answer to the District Court's failure to properly reply to the jury's inquiry, and thereby forbidding the jury from considering the evidence, is disin-

genuous at best. The petitioner had vigorously objected to the instruction. (TR 1127-30). After the instructions, the jury sent a note stating:

> "Can we hear your instruction pertaining to the law concerning sales to North Korea? *We understand that there can be no conspiring if the plaintiff intended to sell to North Korea.*"

There is no question that this understanding by the jury was clearly wrong. The only answer the respondents can give to this fatal error is to misrepresent, in italics, that "The court responded by giving them [the jury] the written instructions and did so *with petitioner's approval.*" (Brief in Opp., p. 6). The fact of the matter is that the District Court gave counsel only three choices for the response to the jury: (1) to re-read all the instructions in open court; (2) to send the jury all the instructions; or (3) to send the jury particular instructions. No clarification or proper answer was to be given the jury even though petitioner pointed out that

> "Even the defendants on the conspiracy issue did not claim that instruction" [the understanding of the jury]. (TR 1134).

Petitioner asked twice if the court's three choices were the only alternatives (TR 1135-36) and was told they were (TR 1135). When the court said it was only going to send the jury all the instructions, without a clarification, petitioner simply said

> "I have no objection, Your Honor, if those are the three alternatives." (TR 1136).

It is plainly frivolous to suggest, as do respondents, that petitioner in any way approved of the District Court's failure to tell the jury that their understanding was wrong. Nor is it candid for respondents to suggest that petitioner is seeking to impeach a jury verdict. That allegation does not survive its statement.

CONCLUSION

For these reasons and the reasons cited in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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